

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,060

UNITED STATES OF AMERICA, APPELLANT

v.

BERNHARD DEUTCH, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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*United States Court of Appeals
For the
District of Columbia Circuit*

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*See also:
Haguer v U.S.*

285 U.S. at 431 p.

195 Fed 2 583

No. 13,060

QUESTION PRESENTED

In a prosecution under the "refusal to answer" clause of 2 U.S.C. § 192, the indictment charged that appellee "unlawfully refused to answer" certain questions asked him by the House Committee on Un-American Activities. The trial court granted a motion to dismiss the indictment for the reason that it failed to charge a "willful refusal to answer."

Therefore, in the opinion of appellant, the following question is presented:

1. Is it necessary in a prosecution under the second clause of 2 U.S.C. § 192 expressly to charge a "*willful*" refusal or is it sufficient to charge in the words of the statute.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,060

UNITED STATES OF AMERICA, APPELLANT

v.

BERNHARD DEUTCH, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On November 22, 1954, appellee Deutch (hereinafter called defendant) was indicted under 2 U.S.C. § 192 for "unlawfully refusing to answer" certain questions asked him by the House Committee on Un-American Activities (J.A. 25). On February 11, 1955, a motion to dismiss the indictment was argued and denied by Judge McLaughlin (J.A. 28), and on October 11, 1955, a motion to reconsider was denied by Judge McLaughlin (J.A. 30). On November 4, 1955, Judge Kirkland on his own motion ruled (J.A. 18-25) that the indictment as drawn was insufficient because it did not contain the word "willfully" and dismissed the indictment (J.A. 31). This appeal is from that dismissal. This Court has jurisdiction over the appeal by virtue of the Criminal Appeals Act, 18 U.S.C. § 3731.

STATEMENT OF THE CASE

Appellee Deutch was indicted on November 22, 1954, on five counts for contempt of Congress for refusing to answer five pertinent questions of the House Committee on Un-American Activities, in violation of 2 U.S.C. § 192. The statute provides that

*“Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, * * *, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, * * *.”* [Emphasis supplied.]

The indictment was drawn under the second clause of the statute (italicized above) which does not include the word “willfully,” as does the first clause.

The indictment was drawn in the language of this second clause of the statute and, like it, did not use the word “willfully.”

The pertinent portion of the indictment follows:

“The Grand Jury charges:

INTRODUCTION

“On April 12, 1954, in the District of Columbia, a subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session, (60 Stat. 828), and to H. Res. 5, 83d Congress.

“Defendant, Bernhard Deutch, appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into

in the indictment (as it is in the statute) by alleging a "refusal" to answer, because a "refusal" means a deliberate and intentional failure to comply.

After hearing oral arguments, the court dismissed the indictment under F. R. Crim. P., Rule 7(c) for failure to allege a willful refusal to answer.

In making this ruling the court referred to several decisions in the field of statutory construction generally, but filed no opinion or memorandum. The court filed an Order Dismissing Indictment on November 4, 1955 (J.A. 31).

STATUTE INVOLVED

2 U.S.C. § 192 provides:

"Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."

SUMMARY OF ARGUMENT

I

A refusal to answer is in its nature a deliberate and intentional act. *Chapman v. U. S.*, 8 App. D. C. 302 (1896).

An indictment alleging an "unlawful refusal" to answer, drawn in the language of the statute, charges a deliberate and intentional act and sufficiently charges the criminal intent required by the decisions from *Chapman, supra*, to *Quinn v. U. S.*, 349 U. S. 155 (1955).

Decisions upholding the instant indictment form are applicable and controlling.

willfulness IS an essential element of the offense of making default but NOT of refusing to answer once the witness appears —

the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant and which he refused to answer."

On February 11, 1955, United States District Judge McLaughlin denied defendant's motion to dismiss this indictment (among other grounds) for failure expressly to charge "willfully." On October 11, 1955, Judge McLaughlin denied defendant's motion to reconsider this motion to dismiss the indictment.

Having been specially set for trial before Judge Kirkland, the case was called on November 4, 1955, and before the actual trial was commenced and before jeopardy had attached, the court itself raised the question of the sufficiency of the indictment for not expressly alleging a "willful" refusal, stating that it was doing so in view of the language of the U. S. Supreme Court in the case of *Quinn v. United States*, 349 U.S. 155, decided May 23, 1955, (J.A. ~~22~~ 23)

Correct
-ion

Referred to and relied upon by the court was the following passage in the *Quinn* case:

"Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intentional refusal to answer.³³ This element of the offense, like any other, must be proved beyond a reasonable doubt. Petitioner contends that such proof was not, and cannot be, made in this case."

³³ *Sinclair v. United States*, 279 U.S. 263, 299. See also *In re Chapman*, 166 U.S. 661, 672, in which the court, while upholding the constitutionality of the statute, recognized deliberateness as an element of the offense."

Government counsel conceded that the criminal intent necessary to constitute a violation of the statute must be proved to be a deliberate and intentional one, but contended that a deliberate and intentional act is charged

not authority factually in point sustaining the instant indictment.

However, after the return of the case to the lower court for trial, and upon conviction, Chapman again appealed. In this appeal he contended that the element of criminal intent involved in the refusal to answer proscribed by this statute required proof of bad faith and evil intent and that a witness who acted in good faith did not violate the statute.

The court rejected Chapman's contention and held that good faith and an honest belief in his rights, even upon advice of counsel, are no defense to a deliberate refusal to answer a pertinent question. The court stated (1) that a deliberate and willful act of refusal to answer a pertinent question violates the statute, and (2) that a refusal to answer is "in its nature a deliberate and willful act."

The Court of Appeals so held, in the following language:⁴

"... Here the expression willfully, which is applied to qualify default in appearing in response to a summons, seems to have been studiously omitted as wholly superfluous and unnecessary in the qualification of a refusal to answer questions propounded. *The refusal to answer necessarily implies willfulness in the legal sense*, and the question of bad faith or evil intent has no place whatever in the case. * * * His refusal to testify was a deliberate and willful act, all the more deliberate and willful because he took counsel upon the subject and took time to consider the consequences; and if *such deliberate and willful act, in plain violation of the specific terms of the statute*, does not constitute an offence under the statute, unless there is also super-added the element of moral guilt and deliberate purpose to violate the moral law, it would be simply impossible to procure any conviction under the statute, and the law would be no more than a dead letter." (P. 316-317). [Emphasis added].

* * *

"Failure to appear in response to a summons may well

⁴ 8 App. D.C. at 316-319.

II and III

The criminal intent which has always been required by Section 192 is that the act be deliberate and intentional, and such a statement in the *Quinn* case does not, as held by the District Court, create a new element for the offenses proscribed.

IV

Cases construing statutes, cited by the District Court, are inapposite.

ARGUMENT

I. The Antecedents of This Indictment

The first indictment to be tried¹ under the contempt of Congress statute of 1857 (11 Stat. 155, now, with minor amendments, 2 U.S.C. § 192) was that of Chapman for refusing to answer questions of a special Senate committee in 1894. Chapman was convicted and his conviction was affirmed on appeal by the Court of Appeals of the District of Columbia (now the United States Court of Appeals for the District of Columbia Circuit) and by the United States Supreme Court.

The three appellate opinions² determining the issues raised by Chapman upheld the constitutionality of this statute and announced the basic principles of law interpreting it and governing prosecutions brought thereunder. These are still the leading cases in this field.

The indictment in the *Chapman* case expressly alleged a "willful" refusal to answer. Therefore, the ruling of that trial court sustaining that indictment against an attack of insufficiency and the affirming opinion of the Court of Appeals³ on a special appeal from the lower court's ruling are

¹ Previously, indictments had been returned against Wolcott (1858) and Kilbourn (1876), but they were not brought to trial. (See 3 Hinds' Precedents, Sec. 1672, as to Wolcott; and 2 Hinds' Precedents, Secs. 1608-1611, and D.D.C., Criminal No. 11290, as to Kilbourn).

² *Chapman v. United States*, 5 App. D.C. 122 (1895); *Chapman v. United States*, 8 App. D.C. 302 (1896); *In re Chapman*, 166 U.S. 661 (1897).

³ *Chapman v. United States*, 5 App. D.C. 122.

refuse, unlike failure, is a positive act i.e., there cannot be a refusal without intent.

be due to other causes than willfulness or deliberate purpose to disobey the mandate of the law; and it would have been manifestly unjust to constitute it a misdemeanor unless it was done willfully. Hence arises the propriety of that qualification in the statute. *But refusal upon examination to answer a pertinent question is in its nature a deliberate and willful act;* and it is all the more deliberate and willful when counsel has been taken and there has been full consideration of the consequences of persistence in the refusal. A requirement of the statute that such refusal should not be regarded as a misdemeanor unless it were willful, or a construction of the statute that imports into this clause the qualification of willfulness properly affixed to the previous clause, would in our opinion be an absurdity.

"The refusal to answer being, therefore, in its nature a deliberate and willful act, and being denounced by the statute, as a misdemeanor, it cannot avail a recusant witness that he may have believed himself to have been only asserting a constitutional right." (P. 318-319). [Emphasis added].

The United States Supreme Court affirmed Chapman's conviction and, in the language of Chief Justice Warren in the *Quinn* case, "recognized deliberateness as an element of the offense."⁵

These decisions affirming Chapman's conviction held that the criminal intent involved in a refusal to answer under Section 192 was the simple criminal intent of one who deliberately and willfully (intentionally) fails to answer a pertinent question.

This definition of the element of criminal intent required for a refusal to answer under Section 192 has never been questioned by appellate authority. (See Part IV of this brief).

The next indictment for contempt of Congress was returned in 1924 against Harry Sinclair, who, like Chapman,

⁵ 349 U.S. 155, 165 (1955).

had refused to answer pertinent questions of a Congressional committee.

Sinclair's indictment was drawn by Mr. Oliver Pagan who was the principal indictment draftsman in the Department of Justice. Relying upon the language of Section 192 as interpreted by the decisions in the *Chapman* case, Mr. Pagan considered it to be unnecessary expressly to charge that Sinclair's refusal was "willful" and he drew the indictment in the language of the second clause of the statute and charged that Sinclair "unlawfully refused" to answer pertinent questions of the Congressional committee, omitting from the indictment the word "willfully" which had been used in Chapman's indictment.

After conviction, Sinclair appealed to the Court of Appeals of the District of Columbia which certified certain questions to the United States Supreme Court, which Court ordered the entire record sent up. The Supreme Court unanimously affirmed Sinclair's conviction.⁶

Sinclair raised fundamental constitutional and other questions on appeal. He also attacked the sufficiency of the indictment to charge an offense under the statute, although he did not complain of its failure expressly to allege "willfully."⁷ The indictment, thus under the scrutiny of the Court, was set out in the Court's opinion,⁸ and its failure to charge "willfully" was before the Court to notice. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."⁹ The Court could have avoided these vital questions and would have reversed Sinclair's conviction for insufficiency of the indict-

⁶ *Sinclair v. United States*, 279 U.S. 263 (1929).

⁷ *Id.* at 265-270, 279.

⁸ *Id.* at 288-289.

⁹ *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 193 (1908); *Light v. United States*, 220 U.S. 523, 538 (1910); *Alma Motor Co. v. Timken Co.*, 329 U.S. 129, 136 (1946); *Peters v. Hobby*, 349 U.S. 331, 338 (1955).

ment to charge an offense under the statute, if it had considered that "willfully" was a necessary allegation. Under these circumstances it would appear that the Supreme Court has approved the form of the instant indictment as a proper charge of refusal to answer under Section 192.

Dictated by logic, suggested by the *Chapman* case, and under the precedent of the *Sinclair* indictment approved by the Supreme Court, every one of the 72 indictments for refusals to answer under Section 192 which have been returned in this District since *Sinclair's* has omitted the word "willfully."¹⁰

Against 53 of these indictments motions to dismiss were made on the grounds of lack of sufficiency for failure to charge an offense under the statute and/or of vagueness for failure sufficiently to inform the defendant of the charge so as to enable him to prepare his defense and to defend against a second prosecution. In 10 of these 53 motions, the failure expressly to allege "willfully" was asserted.¹¹

¹⁰ Government counsel do not know of any reported case in any other jurisdiction in which a "willful" refusal to answer was expressly charged.

¹¹ *United States v. Berman*, #1753-50, 95 F. Supp. 1010, 1011-1012 (Kirkland, J., on January 26, 1951); *United States v. Keeney*, #870-52 (Curran, J., on November 4, 1952); *United States v. Barenblatt*, #1154-54 (Schweinhaut, J., on March 2, 1954); *United States v. Russell*, #1230-54 (Curran, J., February 25, 1955); *United States v. Dunham*, #1148-54 (Curran, J., on September 16, 1955); *United States v. Deutch*, #1152-54 (McLaughlin, J., on February 11, 1955, and on October 11, 1955), the instant case on preliminary motion; *United States v. O'Connor*, #1650-53, 135 F. Supp. 590, 592-594 (McGarraghy, J., on November 15, 1955); *United States v. Watson*, #1151-54 (Schweinhaut, J., on January 6, 1956); *United States v. Singer*, #1150-54 (Matthews, J., on January 18, 1956); *United States v. Sacher*, #1216-55 (Holtzoff, J., on February 24, 1956).

It will be noted that the decisions in the *Dunham*, *Deutch* (on preliminary motion), *O'Connor*, *Watson*, *Singer* and *Sacher* cases were rendered after the decision of the Supreme Court in the *Quinn* case on May 23, 1955, relied upon by Judge Kirkland. In the *O'Connor*, *Watson*, *Singer* and *Sacher* cases, Judges McGarraghy, Curran, Matthews and Holtzoff, respectively, declined to follow Judge Kirkland's ruling in the instant case.

The indictments were sustained by the trial courts in all 53 cases (including the instant case, by Judge McLaughlin on preliminary motion).

Since Sinclair's case only Lawson and Trumbo in this District have attacked on appeal contempt of Congress indictments for refusal to answer. Their attacks, like Sinclair's, were for insufficiency to charge an offense,¹² without specifying failure expressly to allege "willfully." As in the *Sinclair* case, the indictments were before the court.¹³ In this setting the Court of Appeals reached and passed upon fundamental constitutional guarantees in affirming the convictions of Lawson and Trumbo.¹⁴

Thus, the decision affirming the convictions of Lawson and Trumbo indicates for the Court of Appeals the same tacit approval of the instant indictment form that is found in the *Sinclair* case in the Supreme Court.¹⁵

There is a case directly in point in the Second Circuit in which an indictment charging a bare refusal to answer was upheld as a sufficient charge of an offense under the "refusal clause" of Section 192, against an attack for insufficiency. *United States v. Josephson*, 165 F. 2d 82 (1947), *cert. den.* 333 U.S. 858 (1948). The government herein

¹² *Lawson* brief, p. 145; Joint Appendix, pp. 11-13. *Trumbo* brief, p. 64; Joint Appendix, pp. 11-12.

¹³ *Lawson* Joint Appendix, p. 9. *Trumbo* Joint Appendix, p. 9.

¹⁴ *Lawson v. United States, Trumbo v. United States*, 176 F. 2d 49 (1949), *cert. den.* 339 U.S. 934 (1950).

¹⁵ Referring to the doctrine of avoiding decisions of constitutional questions whenever possible, the Supreme Court in *Alma Motor Co. v. Timken Co.*, note 9, *supra*, said at p. 137: "This same rule should guide the lower courts as well as this Court."

¹⁶ Although not necessary for the decision, the court in the *Josephson* case stated that "'willfulness', however it may be defined," is not an element of the offense of refusing to answer. It is believed that the court did not intend to eliminate as an element of the offense the simple criminal intent involved in a deliberate and intentional act, which criminal intent (and no greater one) has always been required for conviction of a willful default and also of a refusal to answer. See cases cited in footnotes 11 and 17, herein. See also Hitz, *Criminal Prosecutions for Contempt of Congress*, XIV *Federal Bar Journal* 2, p. 139 at p. 145.

embraces the result, if not all of the language¹⁶ of that decision.

II. The Decision Below

In dismissing this indictment, the District Court conceded that in many earlier decisions in this jurisdiction a sufficient allegation of "willfulness" had been found in the allegation that the defendant "unlawfully refused" to answer (J.A. 22), but the court stated that something quite different has been added (J.A. 22) by the Supreme Court in *Quinn v. United States*, 349 U. S. 155, decided May 23, 1955. Judge Kirkland held that the decision in the *Quinn* case required a "specific intent" that the refusal be "deliberate" and "intentional" and that this cannot be found in the allegation of "unlawful refusal" (J.A. 24).

In support of this position, the court quoted the following from the opinion of Chief Justice Warren in the *Quinn* case (p. 165):

"Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intentional refusal to answer.³³ This element of the offense, like any other, must be proved beyond a reasonable doubt. Petitioner contends that such proof was not, and cannot be, made in this case.

"³³ *Sinclair v. United States*, 279, U.S. 263, 299. See also *In re Chapman*, 166 U.S. 661, 672, in which the court, while upholding the constitutionality of the statute, recognized deliberateness as an element of the offense."

III. The Criminal Intent Involved in Violations of Section 192 Has Not Been Changed by *Quinn v. U.S.*

The first clause of Section 192 proscribes a willful default by a witness under Congressional summons. The second clause proscribes a refusal to answer a pertinent question. For both clauses the intent required has been determined to be that of a deliberate and intentional act, as distinguished from an accident or an inadvertence.¹⁷

¹⁷ For a willful default: *Townsend v. United States*, 68 App. D.C. 223, 95 F. 2d 352, 357 (C.C.A.D.C. (1938), cert. den. 303 U.S. 664

Such criminal intent is the minimum degree of intent to which may be attached criminal responsibility.

So as properly to attach criminal responsibility to a "default" under clause one, the statute required that it be "willful," so that an accidental failure to appear or to produce records would not be penalized. However, the second clause proscribing a refusal to answer did not require the use of the word "willful" because, as held in the *Chapman* decision, *supra*, the character of being a "non-accidental" or an advertent act is implicit in the meaning of the word "refusal."

The opinion of Chief Justice Warren in the *Quinn* case relied upon by the District Court states:

"Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intentional refusal to answer."

It is evident that the Chief Justice, by citing, without qualification, the *Sinclair* case for this statement of law, does not consider it to be a new element he is adding to the offense.

In the *Sinclair* case, in the passage cited by Chief Justice Warren, the Supreme Court defined the criminal intent involved in this statute as follows:

"There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions.

(1938); *Fields v. United States*, 82 U.S. App. D.C. 354, 164 F. 2d 97, 100 (1947, cert. den. 332 U.S. 851 (1948)).

For a refusal to answer: *Chapman v. United States*, 8 App. D.C. 302, 316-319 (1896); *In re Chapman*, 166 U.S. 661, 672 (1897); *Sinclair v. United States*, 279 U.S. 263, 299 (1929); *Quinn v. United States*, 91 U.S. App. D.C. 344, 203 F. 2d 20, 25 (1952), rev. on other grounds 349 U.S. 155 (1955); *Bart v. United States*, 91 U.S. App. D.C. 370, 203 F. 2d 45, 49 (1952), rev. on other grounds 349 U.S. 219 (1955). See *United States v. Bryan*, 339 U.S. 323, 341 (1950); *Emspak v. United States*, 91 U.S. App. D.C. 378, 203 F. 2d 54, 57 (1952), rev. on other grounds 349 U.S. 190 (1955).

No moral turpitude is involved. *Intentional violation is sufficient to constitute guilt.* There was no misapprehension as to what was called for. *The refusal to answer was deliberate.* The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense, [citing cases]." [Emphasis added.]

As in the *Sinclair* case, the Supreme Court in the *Quinn* case had before it the indictment¹⁸ which, like the instant one, did not expressly allege "willfully." Had the Court felt that such an indictment was defective it would not have proceeded to the decision of constitutional questions. (The *Quinn* case differs from the *Sinclair* case, however, in that in the *Quinn* case the indictment, although set out in full in the record in the Supreme Court, was not itself being attacked on appeal).

IV. Cited Cases Distinguished

In its ruling dismissing the indictment the District Court cited several cases dealing generally with the construction of indictments. (J.A. 21). The court cited *Pullen v. United States*, 164 F. 2d 756 (5th Cir. 1947) for the proposition that an indictment without the word "willful" in it is insufficient. Pullen was indicted under 18 U. S. C. § 52 which provides in part: "Whoever, under color of law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any state, territory, or District, to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution. . . ." In *Pullen*, the indictment failed to charge that the defendant's acts were done willfully, and in holding that the omission of the word "willfully" was fatal to the indictment, the court said:

"The use of the 'willfully' in the statute makes intent a material element of the offense charged in this Count.

¹⁸ Petition for certiorari p. 3 refers to R. 3 (where is reproduced the indictment). Brief of Petitioner, p. 8, refers to R. 3.

* * * *

The word 'willful' rescued the statute from the abyss of constitutional invalidity. If the statute without the word 'willful' is a vacuity, what is an indictment, based on such statute, without such word? * * * If the statute without the word 'willful' would create no valid offense, can an indictment without such word do more? Since the statute without the word 'willful,' in cases involving deprivations of rights under the Fourteenth Amendment, would fall for lack of the required constitutional specificity, would not an indictment without such word, but purportedly brought under such statute, be the exact equivalent of the undertaking to enforce an unconstitutional statute?" P. 759, 761.

In *Pullen* the court relied upon the Supreme Court's decisions in *Screws v. United States*, 325 U. S. 91 (1945), which interpreted the same statute. In *Screws*, the court said:

"... We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. To convict, it was necessary for them [the jury] to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e. g. the right to be tried by a court rather than by ordeal." P. 103.

The District Court also cited *United States v. Schneiderman*, 102 F. 2d 87, in dismissing the instant indictment. In *Schneiderman*, the offense charged was a violation of the Smith Act, and the indictment was drawn in the words of the statute specifically using the words "unlawfully, willfully, and knowingly." In holding the indictment defective the court said:

"... But the specific inquiry here is whether the phrase 'unlawfully, willfully, and knowingly' either denotes or connotes the specific intent which has been held to be an essential element of any offense against the Smith Act." P. 93.

A specific intent to overthrow the government was needed, and since it was not alleged in the indictment, even though

the words "unlawfully, willfully, and knowingly" were used, the indictment was held to be defective.

The *Pullen* and *Schneiderman* cases, relied upon by the District Court are distinguishable on their facts. Both of these cases required a specific intent, while in the case at bar only a general intent is required. The general intent necessary under the "refusal" part of 2 U.S.C. § 192 is just the bare minimum necessary to establish the refusal as being intentional and deliberate, rather than accidental.

Although not cited by the District Court, Judge Weinfeld in the Southern District of New York has dismissed a similar indictment, basing his ruling in part on failure expressly to allege a "willful" refusal to answer. *United States v. Lamont*, 18 F.R.D. 27 (S.D.N.Y. 1955). In holding that willfulness must expressly be alleged the court relied upon the Supreme Court's language in *Quinn v. United States*, 340 U.S. 155 (1955), where it was said that the Government must *prove* a deliberate, intentional refusal to answer. In *Lamont*, the court said the *Quinn* case in effect overruled *United States v. Josephson*, 165 F. 2d 82 (2d Cir. 1947), *cert. denied* 333 U.S. 838 (1948). The court went on to say that since willfulness is an essential element of the offense, it must be charged in the indictment, and cited *United States v. Carll*, 105 U.S. 611 (1881).

In *Carll*, the defendant was indicted for uttering a forged check, but the indictment did not charge the defendant knew the check to be forged, and the statute did not define the offense as requiring that the utterer know the check to be forged. However, the court said that an innocent uttering, i.e., without knowing the check to be forged, is not a crime and that to charge a crime under this statute, the indictment must charge that the defendant uttered a forged check, *knowing it to be forged*. The court said "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.

It will be noted that *Carll* was decided long before *Sin-*

clair v. United States, 279 U.S. 263 (1929), and this latter case did not purport to overrule *Carll* or modify it in any way. Thus, it seems apparent that at least under Section 192 it is not necessary expressly to allege a "willful" refusal to answer, although it is necessary to *prove* that such refusal was willful (deliberate and intentional). The difference between *Carll* on the one hand and *Sinclair* and the instant case on the other, is basically that an indictment must charge an offense in words that fully and clearly state a crime so that the defendant may prepare himself to defend the charge. The word "refusal" means a deliberate choice not to comply, as opposed to the word "failure" which means merely a bare noncompliance. Thus, when a person is charged with refusal to answer, it is patently obvious that his act is intentional and willful. This is not to say that willfulness must not be proved—it must be, as stated in the cases from *Chapman* to *Quinn*—but it is not essential as an *express* allegation in the indictment in order to apprise the defendant of exactly what crime he is being charged with.

Judge Weinfeld also cited *Morissette v. United States*, 342 U.S. 246 (1952), where the defendant was charged with converting government property (old shell casings). At the trial, the judge did not allow the defendant to argue the element of willfulness to the jury, nor did he instruct the jury concerning willfulness. The Supreme Court reversed, saying that willfulness was an essential element of the crime and that it was error for the trial judge not to allow the jury to consider the question of willfulness on the part of the defendant. The *Morissette* case stands for the proposition that willfulness is an essential element of the crime and must be proved upon submission to the jury. In this respect it is similar to *Quinn*, but it does not hold that an indictment must be dismissed because willfulness is not expressly charged.

In *Lamont*, the court also cited *United States v. Cruikshank*, 92 U.S. 542 (1875), in support of the proposition that all essential elements must be charged in the indict-

ment. That case involved a statute which made it a crime to hinder or prevent a person from enjoying or exercising a right guaranteed under the Constitution. The intent involved was a specific intent, and therefore is not applicable to the case at bar.

To summarize, it is the position of the government that the requisite criminal intent involved in a refusal to answer—that it be deliberate and intentional—is charged in the indictment, as it is found in the statute, in the word “refuse.”

CONCLUSION

WHEREFORE, it is respectfully submitted that the action of the District Court be reversed.

LEO A. ROVER,

United States Attorney.

LEWIS CARROLL,

E. TILLMAN STIRLING,

WILLIAM HITZ,

Assistant United States Attorneys.

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APPENDIX

RULING OF THE COURT

The COURT (KIRKLAND J.) In the case of *United States vs. Bernhard Deutch*, Criminal No. 1152-54, the defendant has been indicted for a violation of Title 2, United States Code, Section 192, on some five counts of having had a question propounded by the House Un-American Activities Committee that he refused to answer.

The Court has not had the benefit of seeing the actual testimony, and although reference was made in one brief or motion that was attached, it does not appear in the file.

From the argument the Court gathers the impression that no specific claim of self-incrimination was made; that there was a declination to name persons or to in any way tell what activities they had.

First and foremost, in deciding an issue which was raised by the Court itself preliminary to the trial of this case by the Court without a jury, the Court has made considerable research into the matter, and raised this point in order that it would be determined before jeopardy should attach, or that it should be availed of later when there had been a full hearing and a finding that the indictment was fatally defective because it did not charge an offense.

One must begin in the solution by a reference to the statute itself. The statute is as follows:

“Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100, and imprisonment in a common jail for not less than one month nor more than twelve months.”

Stripped of matter which is not pertinent here, this statute would seem to entail these elements:

“Every person summoned as a witness by the authority of either House of Congress, to do one of two things: To give testimony or to produce papers, upon a matter under inquiry by either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House, willfully makes default”—

and the Court will stop there and paraphrase and interpolate that that would appear that if summoned according to law to appear, for an illustration, in the city of Washington and District of Columbia, and give testimony, and with a clear showing that such summons was duly executed, and the witness failed to appear, it is still required in the charge that he be charged with willfully failing to appear; or, a second illustration, that having been lawfully summoned to appear in the District of Columbia and to produce papers under a subpoena duces tecum, that he shall appear but when he does appear he fails to bring the documents which may be pertinent—and the common practice is to produce them and then claim the privilege which may exist or not, in exhibiting them—that even if he appears it is still, as the Court construes the language of this statute, absolutely required that if he has by inadvertence, or by other cause, not produced the documents, he shall be exonerated, unless he is charged with willfully failing to bring the documents.

Now, we don't have any great problem with that aspect of the statute. But then begins this part of the statute, and it is proceeded first by a comma, followed by the disjunctive “or,” and the statute continues:

“or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be punished according to the statute.”

Now the problem, as one might expect is, does this comma and the disjunctive completely separate these two, so that the word “willfully” is common only to the first part,

namely, that the witness does not show up, or he shows up but he doesn't produce the documents required. If that were so the drafter of this legislation could most conveniently have put a "period" at the end of the word "default". Then it would have been crystal clear.

Now, counsel for the Government, as a good advocate, has argued that since it is put in the one section and left out of the other it is not required to put in the charge, and that the word "refuse" contemplates willful refusal, intentional refusal, specific intent, the Court gathers.

On the other hand, with equal fervor, counsel for the accused say, as one construes this as part of English grammar, that where the clause is "willfully makes default" that that continues through and is to be interpreted "willfully makes default and refuses to answer any question pertinent to the question under inquiry."

Say they, the whole intent, the whole flavor of this statute is to make it possible for one who doesn't willfully fail to answer to have a proper defense. And where he is fully apprised of the situation and still remains mute or fails and refuses to answer, that it shall be charged that he willfully did so.

Now, proceeding upon the basis of the statute we are confronted immediately with case law on the question.

First and foremost, this is a statutory offense. The rule of interpretation is that the language shall be construed strictly and construed against the Government. The Government has a right to put in words which show intent or scienter, and though they are not necessary and may be deemed surplusage, they are not bound by the additional words.

In the case of *Kane vs. United States*, 120 Fed. 2d 990, in the Circuit Court of Appeals in Missouri, in 1941, it was held:

"Upon proper objection"—and as an aside, that is true here because the point has been raised in the pleadings—"made to an indictment before trial, every essential element of the crime sought to be charged is generally required to be charged not merely inferen-

tially but with reasonable certainty and directness since the primary purpose of an indictment is to give the accused sufficient information to enable him to prepare his defense."

Now, to like effect is the case of *Mitchell vs. United States*, 118 Fed. 2d 653, from the Circuit Court of Appeals of the District of New Mexico, decided in 1941, namely, that all parts of an indictment should be reasonably construed so as not to warrant a court in supplying omitted language which is essential to a necessary element of the offense charged.

Now, getting specifically into what we are concerned with is the case of *Pullen vs. United States*, 164 Fed. 2d 756, from Texas, and decided in 1947, where it was held:

"If the element of willfulness is necessary in a statute to sufficiently define the offense, the indictment under such a statute must contain the word 'willful' since immediate injustice to the accused is not done by the statute, but by the indictment under the statute."

In the case of *United States vs. Schneiderman*, which is a District Court case, 102 Fed. Supp. 87, decided in the District Court of California in 1951, it was held that:

" 'Unlawfully' is but a conclusion which means more than allegedly contrary to law."

Citing *Bannon vs. United States*, 156 U. S. 464 and *Davis vs. Utah*, 151 U. S. 262.

There the Court held that to act as such "willfully" means something not expressed by "knowingly," nor expressed by the mere word "unlawfully."

That is the case law on construction.

The Court, since he is a member of the Circuit of District Courts for the District of Columbia, knows something of this problem.

The case of *Rumely vs. United States* has been cited in support of the Government's position. The reference to it is 293 Fed. 532, from the Circuit Court decided in 1923, and certiorari was denied, 263 U. S. 713.

Unfortunately for our application here, the charge in the *Rumely* case concerned a conspiracy to defraud the United States Government by preventing it from seizing certain indebtedness of Rumely to the German Government. It is true that there that Circuit Court opinion had said in substance that while it was the general rule that the term "willfully" could not be omitted from an indictment when the term was part of the statutory definition of the offense, where the facts alleged necessarily import willfulness, failure to use the word was not fatal to the indictment.

The Court doesn't have the charge in the *Rumely* case before it, but drawing on the Court's knowledge of those charges they usually follow the conspiracy charge closely and allege that A and B and with others unknown did unlawfully combine, confederate, and agree together to do certain acts, so that from the words described one can work out, and since there must be the show of, shall I term it, criminal contract, that is the agreement and combination, and then acting upon the design that "willfulness" becomes an element which is clear from the other words in the charge.

Now, the Court will take one further step. Until the case of *Quinn vs. the United States*, decided by the Supreme Court May 23, 1955, the Court is prepared to say that in the construction of the word "unlawful" that it has been stretched in many instances to imply intentional, willful, deliberate, and as was pointed out in the *Fields* case, which is argued in behalf of the Government, that the proof must show deliberate, intentional, and not mere inadvertence. While it is perfectly true that the word "unlawful" has been so stretched, the case of *Quinn vs. United States* has now added something quite different.

As an aside, this circuit is well aware of the fact that there are no formal rules in the bodies of Congress, House of Representatives, or the United States Senate, which set forth categorically the conduct of a contempt proceedings or the foundation of such proceedings before

a committee; but from the cases which have been handed down, *Quinn vs. United States*, *Bart vs. United States*, and *Emspak vs. United States*, it is beginning to evolve that the committee before whom a witness appears has the duty now of instructing the witness, if there is any vagueness, whether he intends to claim his privilege or either to accept the claim or ask him whether he was in fact invoking the privilege, just as the accused in a court of law is not required to use any ritualistic formula, neither is the committee of Congress required to use any ritualistic formula to apprise the witness of what the situation is.

And then at page 9 of the *Quinn* case it is spelled out that there must be a deliberate, intentional refusal to answer. That good faith alone is not a defense. And then that, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction, as pointed out in the *Quinn* case. Just as the witness need not use any particular form of words to present his objection, so also the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's rulings, he has no cause to complain; and that Congress unquestionably has the power to investigate matters and conditions relating to contemplated legislation.

But on the other hand, that the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. If the witness declines to answer because of constitutional objections and the language used is doubtful, the committee may inquire into the nature of the claim before ruling on it; and then if the witness unequivocally and intelligently waives any objection based on self-incrimination, or if he refuses a committee request to state whether he relies on self-incrimination, he cannot later invoke its protection in a prosecution for contempt for refusal to answer that question. What this boils down to is apparently now we

have a framework and beyond the *Chapman* case and the *Fields* case and the *Rumely* case, and beyond cases which have been landmarks in the District of Columbia, we now have another landmark in these matters, so that in the *Quinn* case where the majority speaks in the language:

"Section 192, like the ordinary Federal criminal statute, requires a criminal intent—in this instance a deliberate, intentional refusal to answer. This element of the offense, like any other, must be proved beyond a reasonable doubt. Petitioner contends that such proof was not, and cannot be made in this case."

Then the Court continues and states further:

"In such a instance, the witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent."

And by reference back, the majority say that intent is deliberate, intentional, which could be those words or it could be words such as the first part of the statute has the word "willfull."

This matter is sufficiently important that the case should not go to a full trial and then suffer by virtue of a defect. The rules of Federal procedure contemplate the proper action so that the rights of all parties shall be preserved.

It is now the ruling of this Court that by virtue of the case of *Quinn vs. United States*, spelling out that a specific intent must be proved which necessarily means it must be alleged, and there is no allegation in this indictment other than the word "unlawful" which is too all-inclusive to restrict the proof on the charge to deliberate and intentional and willful refusal, the Court is going to dismiss this indictment and dismisses this indictment under Rule 7(c) of the Federal Rules of Criminal Procedure because the indictment does not fit the rule that it shall be a plain, concise and definite written statement of the—and the Court emphasizes this—"essential facts constituting the offense charged." But relying also upon the Federal Rules

P. 341

339 U.S. - Bryan case

of Criminal Procedure, notably Rule 12(b)(5), and I will quote that:

"If the Court grants a motion based on a defect in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information,"

the ruling of the Court will be that by virtue of the failure to comply with Federal Rule 7(c) this indictment will be dismissed, but under Rule 12(b)(5) the bail of \$500 cash deposit in the Clerk's office of this court will be continued until February 1, 1956, or until further order of the Court, with a view that the Government may either take, as the Court hopes it will, a special appeal and settle this matter—because that could be done on a very short record and with advancement it would be a guide to us who must try these cases in the District Court—or it may do as it properly could, if it thinks well of this opinion, reindict, and there are two terms of two grand juries open so that the matter will not be delayed.

* * * * *

UNITED STATES OF AMERICA

v.

BERNHARD DEUTCH

Criminal No. 1152-54

Grand Jury Original
(2 U.S.C. 192)

The Grand Jury charges:

INTRODUCTION

On April 12, 1954, in the District of Columbia, a subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings,

pursuant to Public Law 601, Section 121, 79th Congress, 2d Session, (60 Stat. 828), and to H. Res. 5, 83d Congress.

Defendant, Bernhard Deutch, appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant and which he refused to answer.

Count One

The committee was advised that a witness by the name of Ross Richardson has stated that you acted as liaison between a Communist Party group on the campus and a member of the faculty at Cornell, and that you knew the name of the member of that faculty, who was a member of the Communist Party. Will you tell us who that member of the faculty was?

Count Two

Will you tell the committee, please, the source of that \$100 contribution, if it was made?

Count Three

Where were these meetings held?

Count Four

Were you acquainted with Homer Owen?

Count Five

The witness is directed to give the name of the person by whom he was approached.

LEO A. ROVER,
*United States Attorney in and
for the District of Columbia.*

A True Bill:

WILSON T. M. BEALE,
Foreman.

* * * * *

[Filed Dec. 13, 1954. Harry M. Hull, Clerk.]

UNITED STATES OF AMERICA

v.

BERNHARD DEUTCH

Criminal No. 1152-54

Grand Jury Original
(2 U.S.C. 192)

MOTION TO DISMISS

Now comes the defendant, BERNHARD DEUTCH, by his attorneys Henry W. Sawyer, III and Edmund D. Campbell, and moves the Court to dismiss the indictment on the following grounds:

1. Public Law 601 § 121, 79th Congress, 2nd Session (60 Stat. 828), which is the enabling legislation of the Committee on Un-American Activities of the House of Representatives, is inherently unconstitutional in that it purports to authorize an inquiry in violation of the First Amendment to the Constitution of the United States.

2. The questions asked by the Subcommittee of the Committee on Un-American Activities of the House of Representatives of the defendant constitute a violation of his

rights under the First Amendment and, therefore, he was under no duty to respond.

3. The questions asked by the Subcommittee of the Committee on Un-American Activities of the House of Representatives of the defendant were not pertinent to the inquiry as required by Title 2, § 192 of the United States Code.

4. The indictment fails to charge a crime in that it does not allege that the defendant's refusal to answer questions was willful.

EDMUND D. CAMPBELL,
Southern Building,
Washington 5, D. C.

HENRY WASHINGTON SAWYER, III,
117 South 17th Street,
Philadelphia, Pa.

Service of a copy of the above acknowledged this
13th day of Dec., 1954. John C. Conliff, Asst. U.S.
Atty.

[Filed Feb. 11, 1955. Harry M. Hull, Clerk.]

UNITED STATES

v.

BERNHARD DEUTCH, *Defendant*

Criminal No. 1152-54

Charge: Violation of Section 192, Title 2, U. S. Code.

On this 11th day of February, 1955, came the attorney of the United States; the defendant in proper person and by his attorneys, Henry Sawyer and George Goodrich, Esquire; whereupon the defendant's motion to dismiss the indictment and the oral motion for a reduction of Cash Bond from \$1,000.00 to \$500.00 dollars, each coming on to be heard, after argument by counsel, the motion to dismiss the indictment is by the Court denied and the

motion (oral) to reduce the Cash Bond from \$1,000.00 to \$500.00 is by the Court granted.

By direction of

CHARLES F. McLAUGHLIN,
Presiding Judge,
Criminal Court # 1.

[Filed September 30, 1955. Harry M. Hull, Clerk]

UNITED STATES OF AMERICA

v.

BERNHARD DEUTCH

Criminal No. 1152-54

Grand Jury Original (2 U.S.C. 192)

MOTION TO RECONSIDER

MOTION TO DISMISS

Now comes the defendant, BERNHARD DEUTCH, by his attorneys Henry W. Sawyer, III and George Herbert Goodrich, and moves the Court to reconsider defendant's Motion to Dismiss on the basis of the decision of the Supreme Court of the United States in *Quinn v. United States* No. 8 October Term 1954, opinion dated May 23, 1955, on the following grounds:

1. The holding of the previously considered controlling decision of the Court of Appeals in *Barsky v. United States*, 167 F2d 241 (1948) based upon the proposition that the power of inquiry of a Congressional Committee "is not limited to the scope or the content of contemplated legislature", has been over-ruled by the holding of the Supreme Court in the *Quinn* case, *supra*, viz., that the power to investigate does not "extend to an area in which Congress is forbidden to legislate." The subject matter of the enabling Resolution of the House Committee on Un-American Activities

is confined entirely to "propaganda", i.e. speech. In the area of speech Congress is forbidden to legislate except only as to the advocacy of the overthrow of the Government by force and violence.

2. The questions as set forth in the indictment which the defendant refused to answer do not have any relationship to the advocacy of force and violence. The official transcript of the hearing at which defendant appeared (attached to defendant's brief on the Motion to Dismiss), of which defendant asks the Court to take judicial notice, reveals that the inquiry did not concern itself with the advocacy of the overthrow of the Government by force and violence and reveals that the defendant specifically negated any knowledge, past or present, of such matters.

3. Inasmuch as the decision in the *Quinn* case, supra, enunciates a doctrine confining Congressional inquiry to an area in which Congress may legislate, contrary to the implications of earlier decisions of the Court of Appeals for this Circuit, defendant moves the Court to reconsider the Motion to Dismiss, in the light of these decisions made subsequent to the Court's ruling thereon.

GEORGE HERBERT GOODRICH,
Ring Building,
Washington 6, D. C.

HENRY W. SAWYER III,
117 South 17th Street,
Philadelphia, Pa.

[Filed October 11, 1955. Harry M. Hull, Clerk]

UNITED STATES OF AMERICA

v.

BERNHARD DEUTCH

Criminal No. 1152-54

ORDER

This matter having come before the Court on motion of Defendant, Bernhard Deutch, to reconsider his Motion to Dismiss, and the Court having considered same and being

fully advised in the premises, it is this 11th day of October, 1955.

ORDERED, that the said motion of the Defendant be, and the same hereby is denied.

CHARLES F. McLAUGHLIN,
Judge.

[Filed November 4, 1955. Harry M. Hull, Clerk]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Criminal Case No. 1152-54

UNITED STATES

vs.

BERNHARD DEUTCH

ORDER DISMISSING INDICTMENT

This cause having come on for trial, and the Court on its own motion having raised the question as to sufficiency of the indictment, pursuant to "Quinn vs. United States, October Term, 1954, Supreme Court, May 23, 1955", in that an essential element of the statute involved (2 U. S. C. 192), a willful refusal to answer was not charged, and after hearing arguments of counsel for both sides,

It is this 4th day of November, 1955.

ADJUDGED, ORDERED and DECREED that the indictment in the above-entitled case be, and the same is hereby dismissed, in accordance with Rule 7 (c), Federal Rules of Criminal Procedure.

IT IS FURTHER ADJUDGED, ORDERED and DECREED that the defendant be, and he is hereby continued on his personal cash bond of Five Hundred (\$500.00) Dollars until the 1st day of February, 1956, or until further order of this Court, in accordance with Rule 12 (b) (5), Federal Rules of Criminal Procedure.

JAMES R. KIRKLAND,
Judge.

United States Court of Appeals
For the
District of Columbia Circuit

FILED APR 27 1956

Joseph W. Stewart

CLERK

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,060

UNITED STATES OF AMERICA, Appellant

v.

BERNHARD DEUTCH, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

HENRY W. SAWYER, III
117 South 17th Street
Philadelphia, Pa.

GEORGE HERBERT GOODRICH
Ring Building
Washington, D. C.

Attorneys for Appellee

No. 13,060

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Should 2 U.S.C. §192 be read with the adverb "willfully" modifying both the verb "makes" and the verb "refuses"?

[Answered by the Court below in the affirmative.]

2. Is an indictment under 2 U.S.C. §192 sufficient if it merely charges "unlawful refusal" without any modifying words indicating intent?

[Answered by the Court below in the negative.]

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,060

UNITED STATES OF AMERICA, Appellant

v.

BERNHARD DEUTCH, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

ARGUMENT

I. STATUTE SPECIFIES OFFENSE AS
BEING "WILLFUL REFUSAL"

A. As a matter of grammar, 2 U.S.C. §192 may be read correctly with the adverb "willfully" modifying only the verb "makes" or modifying both the verb "makes" and the verb "refuses".

The brief of the government assumes that the word "willfully" is omitted as a modifying adverb to the word "refuses" in the language of the statute. The argument assumes that the adverb "willfully" which appears in the single sentence which comprises the whole section modifies only the verb closest to it in the sentence. There is no grammatical necessity for this construction. From the standpoint of the rules of English grammar and construction, the sentence as written is ambiguous on this point.

Either construction is grammatically correct.

The single sentence which comprises 2 U.S.C. §192 contains an introductory series of clauses applicable to the two offenses specified in the section. It is agreed that the introductory material is in the nature of a preamble which sets the stage preceding the definition of the offenses, which, of course, are denoted by verbs.

The common introductory language is as follows:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, . . ."

Following this preamble the statute denotes two actions, in the disjunctive, (which, in the concluding common clause, are stated to be punishable as specified):

"willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, . . ."

It is our contention that the adverb "willfully" can be read with equal deference to the rules of English grammar as modifying only the verb "makes" or both the verb "makes" and the verb "refuses". We contend that the language of the statute applicable to the crime designated therein for which the defendant was indicted is as follows: ". . ., willfully . . . refuses to answer . . ."

B. Of the two grammatical alternatives, one would render the statute unconstitutional on its face and therefore the other must be chosen.

Considering the wording of the statute only from the narrow grammatical standpoint, we find that there is nothing which indicates whether the adverb "willfully" is intended to modify both of the following verbs or only that verb which is physically nearest

to the adverb. We find, however, that the construction which restricts the adverb to modifying only the verb "makes" and thus leaves the verb "refuses" without any modification renders the second action which is punished by the section, so worded as to be unconstitutional on its face. Were the statute to purport to punish any refusal regardless of the circumstances, it would be unconstitutional as purporting to punish refusals which are lawful, particularly certain refusals which are based upon provisions of the Constitution.

In the first place, such a statute would purport to punish a refusal protected by the Fifth Amendment in cases wherein the witness refuses to answer questions on the grounds that the answers might incriminate him. His action is nonetheless a "refusal" and as the statute is read by the government, "refusal", without more, constitutes the crime and thus the statute would, on its face, punish as a contempt a refusal based upon the self-incrimination clause of the Fifth Amendment (even where the plea is entirely justified under the law), and such a statute would, of course, be unconstitutional.

There are other grounds on which a witness may refuse to answer and be legally justified. There may be no quorum of the committee present. The committee may be inquiring as to matters beyond the scope of its authorizing resolution. More important, the information sought may be beyond the power of the committee to constitutionally elicit. Yet to construe the statute in such a way as to make criminal any refusal would be to punish all these legally justifiable refusals.

It might be also that the refusal was based upon the fact that the inquiry was addressed to a private and personal affair unrelated to a valid, legislative purpose and if so, the refusal is

not criminal¹. Indeed, that is a principal contention in this very case. Or again, the inquiry may be in an area in which Congress is forbidden to legislate². If so, the witness's refusal to answer may be protected by the provisions of the First Amendment. This also is a contention in the instant case. Further, the refusal may be lawful by reason of the improper purpose of the proceeding. For example, where the proceeding is penal rather than investigative in nature³. Here again the unequivocal refusal may be entirely lawful and yet without the modifying word "willfully" the statute would purport to punish an action rendered lawful by the Constitution itself.

Most of the foregoing grounds for refusal will at the appropriate time be urged as legal justification for the action of the defendant in this case. To be sure, the Fifth Amendment is not involved at all in this case and a refusal based on a plea of the Fifth Amendment is the most striking example of an action which the government's construction of 2 U.S.C. §192 would render punishable and which is yet quite obviously protected and rendered lawful by the provisions of the Constitution.

The government does not discuss the problem of whether the statute as written actually denotes the crime as a "willful refusal" but they would doubtless meet the above argument as they have met the second argument of the appellee (that, regardless of the actual

1. Kilbourn v. Thompson, 103 U.S. 168 (1880); Sinclair v. United States, 279 U.S. 263 (1929); United States ex rel. Cunningham v. Barry, 29 F.2d 817, (C.C.A. 3d, 1928); Quinn v. United States, 349 U.S. 155 (1955).

2. Quinn v. United States, supra.

3. Quinn v. United States, supra.

language of the statute, the word "willfully" is necessary in the indictment in order to supply the requisite intent required), namely, by the contention that the word "refusal" is a word containing a built-in intent.

We will have occasion to discuss this question more fully in a subsequent section of this brief but suffice it to say here that this is not the case.

The word "refuse" unlike the word "willful" is not a legal word. It is a verb used in the statutes in its ordinary meaning rather than as a word of art. Therefore, we must look to the dictionary for its meaning. The definition of "refuse" as given in Webster's New International Dictionary, Unabridged, (2nd ed. 1956) is--"to decline".

The word "willful" on the other hand is a legal word of art. It has been defined by the courts in a variety of ways; one of the meanings is "without justifiable excuse" and this is the significant meaning for our purpose. In United States v. Murdock, 290 U.S. 389, 394, 54 S. Ct. 223, 226 (1933), the word "willful" was defined as follows:

"The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means [1] an act done with a bad purpose (Felton v. United States, 96 U.S. 699, 24 L. Ed. 875; Potter v. United States, 155 U.S. 438, 15 S. Ct. 144, 39 L. Ed. 214; Spurr v. United States, 174 U.S. 728, 19 S. Ct. 812, 43 L. Ed. 1150); [2] without justifiable excuse (Felton v. United States, supra; Williams v. People, 26 Colo. 272, 57 P. 701; People v. Jewell, 138 Mich. 620, 101 N.W. 835; St. Louis, I.M. & S. Ry. Co. v. Batesville & W. Tel. Co., 80 Ark. 499, 97 S.W. 660; Clay v. State, 52 Tex. Cr. R. 555, 107 S.W. 1129); [3] Stubbornly, obstinately, perversely (Wales v. Miner, 89 Ind. 118, 127; Lynch v. Commonwealth, 131 Va. 762, 109 S.E. 427; Claus v. Chicago Great W. Ry. Co., 136 Iowa 7, 111 N.W. 15; State v. Harwell, 129 N.C. 550, 40 S.E. 48). [4] The word is also employed to characterize a thing done without ground for believing it is lawful (Roby v. Newton, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601), [5] or conduct marked by careless disregard whether or not one has the right so to act (United States v. Philadelphia & R. Ry. Co. (D.C.) 223 F. 207, 210; State v. Savre, 129 Iowa 122,

105 N.W. 387, 3 L.R.A., N.S., 455, 113 Am. St. Rep. 452; State v. Morgan, 136 N.C. 628, 48 S.E. 670. (Numbers in brackets added.)"

There is no requirement that any particular meaning of the word "willful" be designated in this case but the above quotation makes it clear that the word "willful" in law means, inter alia, "without justifiable excuse". This meaning would be particularly apposite to several of the defenses which were suggested above under which the defendant might "refuse" and still be protected by the "justifiable excuse" of the Constitution.

Not So
The defect in the statute read without "willfully" is that it would purport to punish refusals which are legally justifiable and reading the statute with the word "willful" modifying "refuses" would cure this defect.
e.g. 5th Amend - he says -

C. An indictment must include the essential elements of the crime as set forth in the statute.

It is clear that although it may be necessary for an indictment to include elements of a crime which are not spelled out in a statute, no indictment is good which omits elements of the crime which are stated in the statute⁴. It is the contention of this portion of the brief that the word "willful" must be read as modifying the word "refuses" in the statute itself in order for the statute to survive the test of constitutionality. If this be so, no indictment laid thereunder can survive if it omits the word "willful".

In Pullen v. United States, 164 F.2d 756 (C.C.A. 5th 1947), the Court said at page 761:

"The word "willful" rescued the statute from the abyss of constitutional invalidity. If the statute without the word

4. U. S. v. Mann, 95 U.S. 580 (1877)

'willful' is a vacuity, what is an indictment, based on such statute, without such word? If the statute without the word 'willful' would fail to define an offense under the Constitution, could an indictment drawn under such statute charge an offense without the use of this highly significant word? If the statute without the word 'willful' would create no valid offense, can an indictment without such word do more?"

II. REGARDLESS OF THE LANGUAGE OF THE
STATUTE, AN INDICTMENT UNDER 2 U.S.C.
§192 MUST CHARGE "WILLFUL" AS AN
ESSENTIAL ELEMENT OF THE CRIME.

A. An indictment must charge every essential element of the crime even if these elements are not spelled out in the language of the statute.

In the preceding section, appellee contended that, as a matter of construction, the statute itself must be read as containing the word "willful" modifying the word "refuses". Whether or not this be so it nevertheless is necessary to charge in the indictment that the refusal was "willful" if intent is an ingredient of the crime.

It is a familiar proposition that every essential element of the offense must be pleaded in the indictment whether the words of the statutes themselves set forth the element in question or not. This proposition is admitted by the government and the leading case of United States v. Carll, 105 U.S. 611 (1881) is cited on page 15 of the government's brief along with the following familiar statement of the rule:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

The government goes on to state that the Carll case was de-

cided long before Sinclair v. United States, 279 U.S. 263 (1929), noting, however, that the Sinclair case "did not purport to overrule Carll or modify it in any way". From this base the government concludes that since the indictment in the Sinclair case did not contain the word "willful" and yet was not reversed on that ground (the point having never been raised), "willful" is not an element necessary to be pleaded in the indictment as per the above quoted rule established by the Carll case. This reasoning would be at least a plausible inference were it not for the presence of Quinn v. United States, 249 U.S. 155 (1955), discussed more fully below, which specifies the essential elements under 2 U.S.C. §192.

The principle in the Carll case as quoted above nevertheless stands and is the law today and apparently this is conceded by the government, and yet they contend that "willful" need not be pleaded under this rule, i.e., that it is not one of the elements necessary to constitute the offense. This is a paradox. As we shall presently see this is a dilemma which the government cannot reconcile.

B. A deliberate and intentional refusal is an essential element of the crime.

The most recent case involving this section to come before the Supreme Court was Quinn v. United States, 349 U.S. 155 (1955), in which the Chief Justice stated (p. 165):

"Section 192, like the ordinary federal criminal statute, requires a criminal intent--in this instance, a deliberate, intentional refusal to answer³³. This element of the offense, like any other, must be proved beyond a reasonable doubt. Petitioner contends that such proof was not, and cannot be, made in this case.

³³ Sinclair v. United States, 279, U.S. 263, 299. See also In re Chapman, 166 U.S. 661, 672, in which the court, while upholding the constitutionality of the statute, recognized deliberateness as an element of the offense."

This being an "element of the offense", it must be pleaded in the indictment.

Thus the court below correctly and inevitably concluded:

"It is now the ruling of this Court that by virtue of the case of Quinn vs. United States, spelling out that a specific intent must be proved which necessarily means it must be alleged, and there is no allegation in this indictment other than the word 'unlawful' which is too all-inclusive to restrict the proof on the charge to deliberate and intentional and willful refusal, the Court is going to dismiss this indictment and dismisses this indictment under Rule 7(c) of the Federal Rules of Criminal Procedure because the indictment does not fit the rule that it shall be a plain, concise and definite written statement of the--and the Court emphasizes this-- 'essential facts constituting the offense charged.'"

C. The word "refusal" does not contain within itself the requisite intent.

Generally the government concedes the foregoing principles but its contention is that the word "refusal" itself carries with it a kind of built-in intent. Aside from the recitation of the fact that a great number of indictments have, in the past, been drawn without the word "willful", the gist of the government's case is based upon this concept that the word "refusal" embraces the requisite criminal intent. There are a number of answers to this contention:

1. The word "refuse" is not a legal word of art. The dictionary definition of the word does not sustain the government's contention.

This definition is as follows:

- Intermittent Webster 1956*
- "1. To keep free from; to avoid; to shun. Obs.:"
 - "2. To decline to accept; to reject:
 - "3. To decline to submit to or undergo; to decline to do, give, grant; to deny; with following infinitive or gerund, to decline; as, he refused to help his friend:
 - "4. To renounce; to give up; to abandon; to cast off; to decline to bear:
 - "5. To decline to jump or leap over, as a fence or ditch;-- said of a horse:
- "Syn.--Deny, withhold. See DECLINE."

To be sure, the dictionary definition does appear to rule out the concept of inadvertence; the word "refuse" would be sufficient to denote the fact that the action was no mere accident. It should be noted that in definition No. 3 above the dictionary states that when followed by an infinitive the meaning is "to decline".

As the word is used in the statute, it is of course followed by the infinitive "to answer", and "decline" must be considered, therefore, the closest synonym. Now, the mere fact that the word "refuses" does preclude the concept of inadvertence or accident is not sufficient; for the intent required by all the authorities, particularly by the language in the Quinn case, is a criminal intent. The action must be more than merely a conscious action (otherwise the word "knowingly" would do). A word which merely means that the witness declines does not meet the standard that is set down in the Quinn case.

It is the very concepts involved and denoted by the word "willful" which are missing from the word "refuse".

2. If the government's position is correct, the statement of Chief Justice Warren in the Quinn case is a mere redundancy. The government says that the word "refusal" means an act which is intentional and deliberate. Why then does the Chief Justice state that the intent required is "a deliberate and intentional refusal"? Under the government's construction, this is equivalent to the statement that the intent required is "a refusal refusal". Totally aside from the dictionary definition or any other definition, the statement of the Chief Justice in the Quinn case clearly requires that a refusal with a particular intent is the gist of the crime punished by section 192 and if this be so, it follows that the indictment must so state in appropriate language.

3. But the Court in the Quinn case went even further and pointed out that there may be "refusals" which are not punishable. In the first section of this brief we pointed out a number of situations in which the witness might "refuse" and commit no crime. We there concluded that to save the statute, it must itself be read as containing the word "willful" so as to designate what kind of refusal was to be punished. The Court in the Quinn case reaches this

not to answer

same conclusion with respect not to the language of the statute, but to the question of the essential elements of the crime, saying (p. 165):

"Clearly not every refusal to answer a question propounded by a Congressional Committee subjects a witness to prosecution under section 192. Thus if he raises an objection to a certain question--for example, lack of pertinency or the privilege against self-incrimination--the Committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent."

arent
these
refusals
merely

The concept expressed in the above paragraph certainly can not be made to jibe with the government's contention that the word "refusal" per se imports the requisite criminal intent.

CONCLUSION

The proposition urged in this brief is an exceedingly simple one: in order to survive the test of constitutionality the statute must be read with the adverb "willfully" modifying the verb "refuses", if grammatically possible. It is grammatically possible. So read, an indictment laid thereunder is faulty if it omits the word "willfully".

But regardless of the validity of the above proposition, the indictment must still specify every essential element of the crime and the Supreme Court has ruled within the year that a particular intent is required in order to make a refusal a crime, whereas the indictment is bare of any words characterizing the intent of the defendant's refusal.

Wherefore, it is respectfully submitted that the action of the District Court be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief for Appellee was personally served on the United States Attorney this 27 day of April, 1956.

George Herbert Goodrich
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